FLAG DESECRATION UNDER THE FIRST AMENDMENT: CONDUCT OR SPEECH

I. INTRODUCTION

Use of the national flag as a vehicle for expressing political dissent is largely a development of the past decade. On one hand, the context of this expression has been sharply divided public opinion on involvement in Vietnam and other issues which affect all Americans' political and social beliefs. On the other hand, few symbols, if any, represent the wide diversity of feelings embodied in Americans' attitudes toward the national flag. Often within an atmosphere of intense emotion, dissent has been expressed in a variety of ways ranging from burning the flag to using parts of it in "peace buttons" and "protest art."[1] While almost all uses of the flag to express dissent are proscribed by statute, the approaches of legislatures, law enforcement agencies, and the courts have been neither uniform nor effective as deterrents. This ineffective diversity of approaches has resulted in part from a judicial separation of "speech" from non-verbal expression and the unsettled status of the latter in recent Supreme Court applications of first amendment guarantees. This note deals with use of the flag as a means of symbolic expression in the context of that separation and application.

The analysis will suggest that, at least in the past decade, the Court has extended the protections of the first amendment to non-verbal expression on a case by case basis, through selective recognition of the communicative content of some types of conduct. However, in so doing, the Court has held repeatedly that non-verbal expression as "conduct," is different from and less protected than "pure speech." When applied by lower appellate courts to activities which have not been recognized for their content, this differentiation of "conduct" and "speech" often has been inter-

[1] *See, e.g.*, Street v. New York, 394 U.S. 576 (1969) (burning flag in public street); Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970), (flying U.S. flag to the left of the U.N. flag and at half mast); Long Island Vietnam Moratorium Committee v. Cahn, 39 U.S.L.W. 2015 (E.D.N.Y. Jun. 22, 1970) (use of parts of the flag in a "peace button"); Joyce v. United States, 259 A.2d 363 (D.C. Cir. 1969) (tearing and folding flag in public); Hoffman v. United States, 256 A.2d 567 (D.C. Cir. 1969) (wearing shirt that resembled the American flag); United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969) (burning flag on steps of federal court house); People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846, *review granted*, 39 U.S.L.W. 3161 (U.S. Oct. 19, 1970) (No. 169) (use of flag in protest art); People v. Cowgill, 274 Cal. App. 2d Supp. 923, 78 Cal. Rptr. 853 (Super. Ct. 1969), *motion to dismiss appeal granted per curiam* 396 U.S. 371 (1970) (causing flag to be cut and sewn into a vest and wearing the vest); Commonwealth v. Sgorbati, 38 U.S.L.W. 2167 (C.P. Philadelphia County, Pa. May 15, 1970) (reporting for draft induction clad in shorts and flag); State v. Saionz, 23 Ohio App. 2d 79, 52 Ohio Op. 2d 64, *oral argument on appeal requested* (Ohio Dec. 22, 1969) (No. 69-809) (wearing flag as a cape); People v. Keough, 61 Misc. 2d 762, 305 N.Y.S.2d 961 (Monroe County Ct. 1969) (publication of photograph of a woman apparently clad only in a flag); Hinton v. State, 223 Ga. 174, 154 S.E.2d 246 (1967) (lowering flag during protest march). Some additional unreported cases are discussed in Time, July 6, 1970, at 8 and Civil Liberties, Sept. 1970, at 1, col. 1. More examples of uses of the flag for protest purposes are contained in Life, Dec. 25, 1970, at 100, 101, 103.

preted as a dichotomy. This dichotomy is evident in recent decisions upholding broadly drawn statutes which proscribe flag-oriented dissent. With few exceptions, the appellate courts have held these statutes to be valid prohibitions of conduct, and either have failed to recognize the communicative nature of that conduct or have seen its protection as incidental to the statutory regulation. Because these courts have construed the statutes as directed at "conduct," as distinguished from "speech," they have given little consideration to the guarantees of the first amendment as applied to the content of flag-oriented dissent. The tests applied have been standards formulated by the Supreme Court to deal with non-speech activity the regulation of which incidently infringes on free speech, to the exclusion of those standards applicable to the regulation of speech itself.

While there may well be governmental interests which justify regulating expressive uses of the flag, the courts have yet to define either these interests or the extent of their importance as against free speech. The analysis will conclude that, as drafted and construed, the statutes which proscribe use of the flag to voice dissent are aimed at the content of that dissent and not at any potentially harmful results of conduct surrounding its expression. Because the courts have not given the content of flag-oriented dissent full recognition as speech, and because they have yet to define and weigh the governmental interests furthered by regulating that form of dissent, non-verbal expression using the flag currently is subject to statutory proscription where "pure speech" conveying an identical message clearly would be protected.

At the outset, it must be noted that *the* flag is different from *a* flag; the national emblem has been subject to special legislative and judicial treatment. For example, the introduction of the first amendment as protecting use of *a* flag for political expression came in 1931. In *Stromberg v. California*,[2] the Court reversed a state conviction of a young teacher at a children's summer camp under a statute which prohibited displaying a "red flag, banner, or badge" as an expression "of opposition to organized government." The Court recognized the defendant's morning red flag ceremony and pledge as political discussion and held that the statute was so vague and indefinite as to violate the right of free speech embraced by the due process clause of the fourteenth amendment.[3] In 1938, a federal appellate court considered and rejected first and fourteenth amendment arguments in affirming the conviction of demonstrators who, lacking a prescribed parade permit, had carried insulting flags and banners within 500 feet of a foreign embassy.[4] The court held that the restrictions imposed by Congress, focusing on the protection of foreign embassies, fulfilled a legitimate govern-

[2] 283 U.S. 359 (1931).

[3] *Id.* at 368-69.

[4] Frend v. United States, 100 F.2d 691 (D.C. Cir. 1938).

mental purpose and thus were not unconstitutional limitations on first amendment freedoms.

By contrast, all fifty states have "flag desecration" statutes, many of which were first enacted near the turn of the century to curtail certain uses of *the* national flag in political campaigning and commercial advertising.[5] The Supreme Court first upheld such a statute in 1907,[6] affirming the conviction of brewers who had painted a representation of the flag on their bottles of beer and holding that a state could prohibit use of the national emblem for profit. Noting that Congress had not chosen to legislate in the field, the Court held that the state's power followed from its interest in preserving the well being, peace amd prosperity of its citizens, rejecting an argument that exemptions in the statute violated the equal protection clause of the fourteenth amendment. As in other federal and state decisions on flag desecration statutes prior to 1960,[7] first amendment freedoms were not at issue.[8]

While the first amendment was not a factor in pre-1960 decisions affirming state power to prohibit negative actions toward the flag, its guarantees were at issue where state power to require affirmative expression toward the national emblem was questioned. In 1942, Congress enacted legislation which prescribed and standardized procedures for displaying, handling and disposing of the national flag but imposed no sanctions for non-compliance.[9] In the following year, explicitly overruling an earlier holding,[10] the Supreme Court held unconstitutional as violative of due process and equal protection under the first and fourteenth amendments a state board of education resolution requiring all school children to salute the flag on pain of expulsion and penalty of unlawful absence while thus expelled.[11] Speaking for a divided Court, Mr. Justice Jackson stated that the religious views or

[5] An historical summary of this legislation is contained in Note, *Flag Burning, Flag Waving and the Law*, 4 VALPARAISO U.L. REV. 345 (1970), another in Note, *Flag Desecration — The Unsettled Issue*, 46 NOTRE DAME LAWYER 201 (1970).

[6] Halter v. Nebraska, 205 U.S. 34 (1907).

[7] *Ex parte* Starr, 263 F. 145 (D. Mont. 1920) (defendant sentenced to 10 to 20 years at hard labor for saying that the flag was "nothing but a piece of cotton"); People v. Van Rosen, 13 Ill.2d 68, 147 N.E.2d 327 (1958) (publication of a photograph of woman dressed in hat, sunglasses, and a flag); Johnson v. State, 204 Ark. 476, 163 S.W.2d 163 (1942) (saying of the flag that it is only a rag based on Jehovah's Witnesses literature; the dissent is worthy of note as being ahead of its time); State v. Peacock, 138 Me. 339, 25 A.2d 491 (1942) (defendant saying that if he had a flag he would tear it up and trample it and then moving his hands and feet to illustrate this, all in the confines of a private home); People v. Picking, 288 N.Y. 644, 42 N.E.2d 741, 33 N.Y.S.2d 317, *cert. denied*, 317 U.S. 632 (1942) (flags used on automobile as part of advertising); State v. Schlueter, 127 N.J.L. 496, 23 A.2d 249 (1941) (tearing and crumpling the flag).

[8] A notable exception is *People ex rel. McPike v. Van de Carr*, 178 N.Y. 425, 70 N.E. 965, 86 N.Y.S. 644 (1904) where the court considered and rejected arguments based on the first and fourteenth amendments in upholding the conviction of a cigar store manager who had in his possession for sale two boxes of cigars with pictures of the flag affixed.

[9] FLAG CODE RESOLUTION of 1942, 36 U.S.C. §§ 171-82 (1964).

[10] Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

[11] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

sincerity of the Jehovah's Witnesses who refused to participate in the salute ceremonies were not material to the constitutional conclusion, that the state possessed no power to require affirmative acts of expressed loyalty to the flag and that the limitations of the fourteenth amendment become more restrictive when "the specific prohibitions of the First become its standard,"[12] thus justifying suppression of expression only in the face of clear and present danger which the state is empowered to proscribe and punish.[13] Implicit in the opinion is the view that freedom not to salute the flag is protected expression under the guarantees of the first amendment. Mr. Justice Black's concurring opinion stressed the futility of coerced love of country[14] and expressed the position that religious beliefs could be regulated by the state as to time and place but only when such laws were "imperatively necessary to protect society as a whole from grave and pressingly imminent dangers."[15]

To date these standards of limited governmental power to proscribe flag-oriented political expression and recognition of such expression as protected by the first amendment have not been applied to symbolic dissent in the form of burning the flag or even wearing a shirt which resembles it. One of the reasons why this is so may be found in the Court's recent judicial separation of "speech" and non-verbal expression. A review of that treatment is necessary before returning to the flag desecration cases of the past decade.

II. SYMBOLIC EXPRESSION AND THE FIRST AMENDMENT

It is axiomatic that any concept of ordered liberty entails some limitation on freedom of speech. Even "pure speech" may be subject to regulation with respect to time and place.[16] Where speech has been regulated because of its content, the Court has held that the regulating statute must be narrowly drawn[17] and that the threat presented by that content be substantial and immediate.[18] Thus a speaker's advocacy of unlawful political

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[12] *Id.* at 639.

[13] On *Barnette* generally see D. MANWARING, RENDER UNTO CAESAR (1962), at 206-53. The doctrine that a state cannot require affirmative action in connection with flag salutes has been carried to the extent that a state cannot require children who do not participate in the pledge of allegiance ceremony to leave the room, *Frain v. Baron*, 307 F. Supp. 27 (E.D.N.Y. 1969) and cannot require students to stand while the ceremony is conducted, *Banks v. Bd. of Public Instruction of Dade County*, 314 F. Supp. 285 (S.D. Fla. 1970). Interestingly enough *Barnette* was anticipated by a state court in 1942 which held that a school could not force children to salute the flag where refusal was based on religious beliefs under freedoms guaranteed by the Kansas "Bill of Rights." *State v. Smith*, 155 Kan. 588, 127 P.2d 518 (1942).

[14] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 644 (1943) (Black, J., concurring).

[15] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 643-44 (1943).

[16] Schenck v. United States, 249 U.S. 47, 52 (1919).

[17] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[18] Feiner v. New York, 340 U.S. 315 (1951).

means,[19] or an official's mere fear that the words will result in disorder,[20] does not justify punishment for the content of the speech. But where nonverbal communication is entwined with conduct which is itself subject to regulation, the problem of applying the first amendment becomes more complex. To what extent the symbolic speech may be incidentally regulated depends upon the existence and importance of the governmental interest in controlling the conduct. Conversely, governmental control of the conduct may be limited by the nature and content of the symbolic speech. In extending freedom of speech to symbolic expression, it must be determined first, what activities constitute symbolic speech, second, what overriding interests of government require limitation of those activities, and third, what kinds of speech are to be protected.[21]

A. *Non-verbal Expression as Protected Speech*

The civil rights demonstrations of the past decade provide the most expansive example of the Supreme Court's willingness to extend the guarantees of the first amendment to political activity by labeling that activity as a form of speech. Thus, "freedom of expression" is not limited to the form of speech and may include failing to leave a library[22] or public eating place,[23] marching and assembling,[24] or even engaging in concerted techniques of litigation.[25]

A statute so vague as to be beyond reasonable interpretation violates due process.[26] But when the activity proscribed by a statute is labeled as a means of communication, the standards of narrowness and specificity are increased.[27] In striking down a state court conviction of participants in a civil rights demonstration who had marched without a permit, the Court noted that while not entitled to the same protection as "pure" speech, the demonstration did constitute expression:

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[19] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[20] Terminiello v. Chicago, 337 U.S. 1 (1949); Feiner v. New York, 340 U.S. 315 (1951) (Black and Douglas, JJ., dissenting separately).

[21] In what is perhaps a special case, obscenity, communication has been held to be outside the protection of the first amendment because its content is without "redeeming social value," *Roth v. United States*, 354 U.S. 476 (1957); *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *But see Winters v. New York*, 333 U.S. 507 (1948), or because its content has been made worthless by the means of its dissemination. *Ginzberg v. United States*, 383 U.S. 463 (1966). Parenthetically, no appellate court has affirmed a flag descration conviction on the basis that the ideas expressed by the descrator were utterly without redeeming social value.

[22] Brown v. Louisiana, 383 U.S. 131 (1966).

[23] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[24] Gregory v. Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Cox v. Louisiana, 379 U.S. 559 (1965).

[25] N.A.A.C.P. v. Button, 371 U.S. 415 (1963).

[26] Connally v. General Constr. Co., 269 U.S. 385 (1926).

[27] Baggett v. Bullitt, 377 U.S. 360 (1964); Stromberg v. California, 283 U.S. 359 (1931). *Compare* Ashton v. Kentucky, 384 U.S. 195 (1966) *with* Beauharnais v. Illinois, 343 U.S. 250 (1952).

> [A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.[28]

Similarly, an overbroad statute is subjected to more rigorous standards when the conduct to be limited is labeled as a means of communication.[29]

While labeling activity as a form of communication near speech brings it under the protection of the first amendment, the labeling may also free the activity from often-desirable governmental control. In providing first amendment guarantees to students who wear armbands as an expression of political dissent,[30] the power of state school officials to regulate student activity in other areas may be curtailed. At least on a case by case basis, it may be desirable to protect the right of protestors to march on the streets and undesirable to extend these same rights to identical activity in the immediate vicinity of a particular class of public building.[31] Functionally, there are at least two solutions to this dilemma: the first lies in selective recognition of overriding state interests, the second in extending less protection to conduct than to "pure speech."[32]

B. *Non-verbal Expression as Conduct Subject to Regulation*

The state's interest in protecting the health and well being of its citizens justifies control of even "pure speech" in some circumstances.[33] But maintaining a parity between individual freedom and government control is at least made easier on a case by case basis if some activities are subject to less protection—and hence more state regulation—than others under the first amendment. Mass marching, as "conduct," is subject to state regulation as marching. Thus, a protest marcher, while recognized as engaging in an activity close to speech, is not entitled to the same measure of protection as one who communicates his ideas by "pure speech."[34] However, when it is peaceful and orderly, recognition of the activity as symbolic speech may limit the infringement imposed by regulation of its "conduct"

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[28] Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

[29] Whitehall v. Elkins, 389 U.S. 54 (1967); Zwickler v. Koota, 389 U.S. 241 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Thornhill v. Alabama, 310 U.S. 88 (1940). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[30] Tinker v. Des Moines Independent Community School Dist., 393 U.C. 503 (1969).

[31] *Compare* Cox v. Louisiana, 379 U.S. 536 (1965) *and* Edwards v. South Carolina, 372 U.S. 229 (1963) *with* Adderly v. Florida, 385 U.S. 39 (1966) *and* Cox v. Louisiana, 379 U.S. 559 (1965).

[32] One might extend this argument to arrive at a conclusion as to why the Court has dealt with the civil rights cases cited at notes 22 through 31, *supra*, primarily as speech rather than assembly cases under the first amendment no matter what the intent of the participants.

[33] *See* notes 16 to 18, *supra*.

[34] Cox v. Louisiana, 379 U.S. 536, 555 (1965); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

element.[35] This distinction between speech and symbolic expression may extend to activities which are virtually nothing but expressive. For example, in *Tinker v. Des Moines Independent Community School District*,[36] the Court recognized student wearing of armbands as symbolic speech qualifiedly protected by the first amendment. But the Court at the same time noted that it read the first and fourteenth amendments "to permit reasonable regulation of speech-connected activities in carefully restricted circumstances."[37]

These "circumstances" are subject to legislative as well as judicial definition, and the Court's application of "carefully restricted" may well depend in part upon whether Congress or a state legislature enacts the definition.[38] In *Gregory v. Chicago*,[39] the Court reversed convictions of civil rights demonstrators who had been arrested for violation of a disorderly conduct statute when they refused to disperse on an official's command. Delivering the Court's opinion, Mr. Chief Justice Warren recognized the demonstration as peaceful and orderly symbolic speech protected by the first amendment and stated that the record showed the demonstrators to have been convicted, not of disorderly conduct, but for refusal to disperse. If this opinion can be interpreted to hold that a state, under its legitimate power to maintain public peace, cannot expand the definition of "carefully restricted circumstances" in order to curtail indirectly the exercise of first amendment rights, it stands in some contrast with an earlier opinion upholding the application of a federal statute.

In 1965, in response to incidents of war protest draft card burning, Congress expanded a statute theretofore prohibiting forgery or other alteration of a draft card to proscribe "knowing destruction or mutilation."[40] The Act had previously made non-possession of a draft card criminal conduct.[41] One registrant burned his card in public protest and was arrested, charged with and convicted, not of breaching the peace, but of failure to have the registration certificate in his possession and of knowingly destroying it. The Court of Appeals for the First Circuit[42] affirmed the non-possession conviction but, after examining the history of the 1965 enactment, reasoned correctly that the legislative proscription was both redundant and aimed at suppressing a form of dissent. Noting that symbolic

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[35] Cox v. Louisiana, 379 U.S. 536 (1965); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Gregory v. Chicago, 394 U.S. 111 (1969); Brown v. Louisiana, 383 U.S. 131 (1966).

[36] 393 U.S. 503 (1969).

[37] *Id.* at 513.

[38] In this light, and in terms of government control of non-verbal expression, the due process clause of the fourteenth amendment may be more restrictive than that of the first.

[39] 394 U.S. 111 (1969).

[40] THE UNIVERSAL MILITARY AND SERVICE TRAINING ACT of 1948, 50 U.S.C. § 462(b)(3) (Supp. I, 1965): "Any person . . . who forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate . . . ." (amending language emphasized).

[41] 50 U.S.C. § 462(b)(6).

[42] O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967).

speech is protected by the first amendment the court concluded that "statutes that go beyond the protection of [the legitimate interests of the community] to suppress expressions of dissent are insupportable,"[43] and reversed the conviction for knowing destruction.[44] The Supreme Court, here again speaking through the Chief Justice, vacated the judgment of the court of appeals and reinstated that of the district court,[45] holding that the two subsections of the statute served overlapping but not identical interests and stating that it does not examine congressional motive or wrongful purpose. Distinguishing *Stromberg*[46] on the basis that the statute there struck down had been aimed at suppressing communication, Chief Justice Warren reviewed the function of the registration certificate under broad congressional power to raise and support armies and concluded that the enactment no more abridged free speech than a motor vehicle law prohibiting the destruction of drivers' licenses.[47]

In more clearly delineating the relation between governmental control and symbolic speech the Chief Justice set out the Court's most definitive statement to date of that relationship:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[48]

This widely cited passage may have serious limitations when applied generally to non-verbal activity proscribed by state and national legislatures, where the governmental interest is not defined, and where the difference in "conduct" and "speech connected activity" is not delineated. In effect, the incidental restriction on first amendment freedoms may be something more than incidental.

C. *Political Expression as Favored*

The first amendment was framed to protect those means of communication through which government operates and by which it is changed.[49]

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[43] *Id.* at 541.

[44] *Contra,* United States v. Miller, 367 F.2d 72 (2d Cir. 1966), *cert. denied,* 386 U.S. 911 (1967); Smith v. United States, 368 F.2d 529 (8th Cir. 1966).

[45] United States v. O'Brien, 391 U.S. 367 (1968).

[46] Stromberg v. California, 283 U.S. 359 (1931).

[47] United States v. O'Brien, 391 U.S. 367 (1968).

[48] *Id.* at 377. *See generally* 18 AM. U. L. REV 232 (1968).

[49] A. Meiklejohn, *The First Amendment Is an Absolute,* 1961 SUP. CT. REV. 245. This section is not intended to suggest that the Supreme Court reads the first amendment exactly as Professor Meiklejohn does. However, it is clear that the Court has classified the content of some speech in holding that speech without the amendment's protection. *Valentine v. Chrestensen,* 316 U.S. 52 (1942), (commercial speech differentiated); *see* note 21, *supra.* The section

The amendment stands as a definition of both the power and the responsibility of government and as a limitation on its excesses. Of course, the amendment's freedoms are not confined to strictly "political" ideas, but the essence of its mandate is political in a larger sense, and is directed to those activities of communication which distinguish representative government.[50] As read by the Court the first amendment may preclude a state from making a crime the dissemination of an idea which tends to create "an attitude of stubborn refusal to salute, honor, and respect the flag and government of the United States,"[51] or from refusing to seat a legislator because of his statements against the Vietnam war,[52] or from requiring a loyalty oath of veterans as a requisite for property tax exemptions.[53] Even a valid United States statute designed to protect the President from threats cannot be interpreted to make criminal a brash political expression uttered in debate in a small gathering,[54] and the interest in full and free political discussion may limit the personal remedies of a defamed public official. In the words of Mr. Justice Brennan:

> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[55]

While activities recognized as symbolic speech and thus not entitled to full protection of the first amendment may be regulated,[56] acknowledgment of the political nature of those activities may decrease the extent to which they are subject to limitation.[57] Just as a speaker's right to advocate unlawful political means is protected by the first amendment,[58] a mere fear

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does suggest that the Court has taken pains to protect and keep open the processes of debate on public and political issues, and has recognized certain content as favored in so doing.

[50] For example, arguing that obscenity was utterly without redeeming social importance, Mr. Justice Brennan discussed the first amendment in the context of political speech:

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. *Roth v. United States*, 354 U.S. 476, 484 (1957).

[51] Taylor v. Mississippi, 319 U.S. 583, 584 (1943).

[52] Bond v. Floyd, 385 U.S. 116 (1966).

[53] Speiser v. Randall, 357 U.S. 513 (1958).

[54] Watts v. United States, 394 U.S. 705 (1969).

[55] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); *see generally* Note, *Desecration of National Symbols as Protected Political Expression*, 66 MICH. L. REV. 1040 (1968).

[56] United States v. O'Brien, 391 U.S. 367 (1968); Cox v. Louisiana, 379 U.S. 536 (1965); Adderley v. Florida, 385 U.S. 39 (1966).

[57] *See* discussion notes 50 to 55, *supra*; Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968).

[58] Brandenburg v. Ohio, 395 U.S. 444 (1969).

of disorder does not excuse governmental limitation of the right to speak,[59] and exercise of that right through non-verbal activities may demand government protection before limitation.[60] The Court's recent treatment of two instances of non-verbal expression suggests that when activities "closely akin to pure speech" are political in nature, the gap between conduct and speech is narrowed.

In *Tinker v. Des Moines Independent Community School District*[61] the Court declared unconstitutional as violative of the first and fourteenth amendments a policy of the Des Moines school principals specifically prohibiting the wearing of armbands. Mr. Justice Fortas' opinion stated that the students' purpose in wearing the armbands was to express dissent toward American involvement in Vietnam, recognized this activity as symbolic speech within the protection of the first amendment,[62] and disavowed the proscriptive rule from dress and grooming regulations or prohibitions on disruptive activity, rejecting the district court's finding that fear of disruption justified the principals' policy.[63]

In *United States v. Smith*[64] the Court of Appeals for the Fifth Circuit affirmed the convictions of participants in a skit protesting the Vietnam war. The skit was repeated during a period of about two hours outside an armed forces induction center, attracting public attention but resulting in no violence.[65] The participants were arrested for and convicted of wearing current issue distinctive parts of Army uniforms in violation of a federal statute.[66] The appeal was based on both the first amendment and the statutory exemption excluding theatrical and motion picture productions so long as the performance does not tend to discredit the service of which the uniform is a part.[67] The court held that the skit was not within the legislative exemption. In rejecting the free speech argument the court recognized that the skit was communication entitled to some but less first amendment protection than pure speech, noted that the statute proscribed conduct as opposed to speech, and concluded that the constitutional balance lay in favor

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[59] Terminiello v. Chicago, 337 U.S. 1 (1949); Feiner v. New York, 340 U.S. 315 (1951) (Black and Douglas, JJ., dissenting separately).

[60] Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

[61] 393 U.S. 503 (1969).

[62] *Id.* at 505.

[63] *Id.* at 508.

[64] 414 F.2d 630 (5th Cir. 1969), *rvs'd sub nom.*

[65] The skit, which had been rehearsed the previous night before an audience, consisted in part of one "actor" who wore some distinctive parts of an army uniform shooting a water pistol filled with red fluid at another "actor" who was dressed in fatigues, and then running over to the fallen figure and saying, "My God, this is a woman." One of the defendants participated in the skit while the other passed out leaflets to onlookers.

[66] 18 U.S.C. § 702 (1964).

[67] 10 U.S.C. § 772(f) (1964).

of the government, distinguishing *Tinker*[68] on the basis of a "hasty rule" as against a valid federal statute. A concurring opinion, citing *O'Brien*,[69] was based on the "legitimate nonspeech objective of the statute" rather than the distinction between speech and conduct.[70]

The Supreme Court reversed in *Schacht v. United States*.[71] Citing *O'Brien*[72] Mr. Justice Black's opinion started with the conclusion that the prohibition against unauthorized wearing of the uniform was valid but continued that it must be read in light of the theatrical exemption, concluding that the anti-war skit on a public street was within that exemption. Turning to and striking down the final clause of the exemption, the Court held that it combined with the prohibition against wearing a uniform to unconstitutionally restrict freedom of speech. Denying the exemption to performances that tend to discredit the service of which the uniform is a part, Justice Black continued, "leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it . . . ."[73]

> An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance.[74]

That this right of political speech extends to the symbolic expression of wearing parts of a uniform and tending to discredit the Army in a "theatrical" performance on a public street may indicate a narrowing of the judicial gap between symbolic and pure speech.

D. *Difficulties with the Conduct/Speech Dichotomy*

Judicial maintenance of the parity between governmental control and first amendment freedoms during the past decade has been largely on a case-by-case basis. Aside from the individual differences in the circumstances of any two given cases, such an approach both retains the Court's discretionary flexibility and limits those instances where statutory norms are constitutionally invalidated completely.[75] The additional techniques of

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[68] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[69] United States v. O'Brien, 391 U.S. 367 (1968).

[70] United States v. Smith, 414 F.2d 630, 636 (5th Cir. 1969), *rv'd sub nom.*

[71] Schacht v. United States, 398 U.S. 58 (1970).

[72] United States v. O'Brien, 391 U.S. 367 (1968).

[73] Schacht v. United States, 398 U.S. 58, 63 (1970).

[74] *Id.* at 63. A concurring opinion stated that if the jury had been instructed to find and had found that there was no theatrical production, then the verdict should have been sustained. But since the jury could have convicted on either of two theories, only one of which could stand appeal, the conviction must be reversed, citing *Stromberg*. (White, J., joined by Burger, C.J., and Stewart, J., concurring).

[75] For example, in ruling on vague or overbroad statutes which infringe on first amendment freedoms, the Court may, under the dictates of a particular case, read its constitutional mandate as precluding abstention, *Zwickler v. Koota*, 389 U.S. 241 (1967), and may simply strike down an offending proscription, *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Cantwell v. Connecticut*, 310 U.S. 296 (1940), even where the

selective recognition of governmental interests and the conduct/speech dichotomy, which allows for the separation of "pure speech" and non-verbal communication, increase this flexibility, as has been noted. But the presence of these only slightly defined variables has some serious drawbacks when the holdings of the Court are subjected to functional application by legislatures, law enforcement agencies and "reasonable men" attempting to exercise their first amendment freedoms as forcefully as possible within the limits of the law. Where no fairly predictable line is drawn between permissible and impermissible governmental interests and between "pure speech" and non-verbal expression, the task of applying the first amendment may result in unconstitutionally selective law enforcement or more or less total disregard for the law by potential political dissenters or both. Moreover, by its nature the case-by-case approach results in less normative and more individual applications, with wide diversity in trial and appellate courts.[76] This is particularly true in situations where the governmental interest has not been defined by the Court and the particular means of non-verbal expression is yet to be recognized as activity approaching pure speech. In the words of Mr. Justice Harlan:

> The Court has, as yet, not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing the conduct against the constitutionally protected interest in freedom of expression.[77]

It is arguable that such a test, applied in the manner of *O'Brien*,[78] would only add to a technique of limited value a standard with serious limitations. The freedoms of the first amendment have always been subject to circumstantial limitations—if only with regard to time and place. Speech, even "pure speech" is, after all, both symbolism and conduct, as are assembly and use of a printing press. It may be that nothing more than recognition of an activity as communication is required, not a recognition of the value of its particular content but rather that the content is a form of speech. The antecedents for this recognition absent a wide distinction between "speech" and "conduct" have been observed in *Barnette*,[79] *Cant-*

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particular defendant's conduct may not have been constitutionally privileged, *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Kunz v. New York*, 340 U.S. 290 (1951). On the other hand, the Court may focus on the results of broad application of an otherwise valid statute and confine its reversal to that application as affecting the particular defendant, thus both extending first amendment protection by narrowinng the statute and still saving its valid uses from oblivion or total legislative redrafting. *Watts v. United States*, 394 U.S. 705 (1969); *United States v. Robel*, 389 U.S. 258 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960); Note, *Less Drastic Means and the First Amendment*, 78 YALE L. J. 464 (1969).

[76] Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

[77] Cowgill v. California, 396 U.S. 371, 372 (1970) (Harlan J., concurring).

[78] United States v. O'Brien, 391 U.S. 367 (1968).

[79] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

well,[80] *Stromberg*,[81] and others. As examination of the flag desecration cases of the past decade will illustrate, judicial labeling of symbolic expression as "conduct" to the exclusion of its content, results in inadequate consideration of the message expressed and of the governmental interest in regulating or prohibiting that message.

III. FLAG-ORIENTED EXPRESSION, THE LEGISLATURES, AND THE COURTS

The leading flag desecration case of the decade was initiated with the shooting of James Meredith in June, 1966. Hearing of the incident a decorated World War II veteran named Street took one of his flags to a nearby corner and publicly burned it, gathering a small crowd and saying among other things, "If they let that happen to Meredith we don't need an American flag."[82] He was convicted under a New York statute which makes it a misdemeanor to "publicly mutilate" the flag.[83] Chief Judge Fuld's opinion affirming the conviction recognized non-verbal expression as afforded some but less first amendment protection than pure speech. Stating that the interest protected by that amendment is the substance of speech and not its form and concluding that the form could be proscribed in the furtherance of a legitimate state interest, the court held that the statute protected the public peace, to which Street's act of burning was just as dangerous as if he had stood on the corner "shouting epithets at passers by." The court emphasized that it was not considering an act which lacked the clear manifestation of intent to desecrate the flag.

The Supreme Court, finding nothing in the record to demonstrate that Street could not have been convicted for both his act and his words, a consideration which had been ignored by the New York courts, reversed on that ground and limited its opinion to the words alone, emphasizing that it was not reaching the wider constitutional question.[84] Four justices dissented separately, all feeling that the Court should have met and decided the constitutionality of the statute prohibiting desecration. Chief Justice Warren and Justice Fortas expressed the belief that both the states and the federal government could protect the flag from acts of desecration, the latter on the basis that actions are not entitled to the same protection as speech alone.

Of course, analysis of this decision can be concluded with the observation that the New York courts failed to consider Street's words, but the statute under which he was convicted prohibits casting contempt upon the

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[80] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[81] Stromberg v. California, 283 U.S. 359 (1931).

[82] People v. Street, 20 N.Y.2d 231, 234, 229 N.E.2d 187, 189, 282 N.Y.S.2d 491, 493 (1967).

[83] N.Y. GEN. BUS. LAW § 136 (McKinney 1968) (*formerly* PENAL LAW § 1425).

[84] Street v. New York, 394 U.S. 576 (1969).

flag by word or act.[85] If, as Judge Fuld wrote, Street's act was just as dangerous to the public peace as shouting epithets at passers by, this could only have been because of the message contained in burning the flag. Street was not convicted of burning "something" on a corner but, at least in the view of the New York courts, of burning a flag. If this symbolic expression presented an immediate threat to the public peace, it could only have been because passers by would react to Street's political message. The act of desecrating the flag, unlike that of "sitting in," or protest marching, is conceptually inseparable from the expression contained in the act. Clearly, the statute was applied to the substance of Street's expression and only incidentally to its form.

The Court's next opportunity to examine a flag desecration statute came in 1970 on appeal from a conviction for having caused a flag to be made into a vest and wearing the vest in public. The defendant had been convicted under a California law[86] which made it a misdemeanor to "publicly mutilate, deface, defile or trample" the American flag.[87] The Court granted *per curiam* a motion to dismiss the appeal,[88] but a concurring opinion suggests that this may have been because the symbolic speech issue was not separable in the record.[89] It can be argued that a "symbolic speech issue" will never be separable, because the "conduct" element of the activity *is* its communicative content. This is not to suggest that flag desecration is subject to unlimited first amendment protection, but only that the standards by which its regulation is measured should be those applicable to the content and form of speech, not just to its form alone. However, recent appellate decisions on the flag desecration statutes, as the language of those statutes, have seldom taken notice of this distinction. The real constitutional issues have been sidestepped by labeling, under recent Supreme Court decisions, flag desecration as "conduct." An examination of those statutes and decisions illustrates the point.

A. *A Sample Flag Desecration Statute, Ohio Revised Code § 2921.05*

The Ohio flag desecration statute, amended in 1967,[90] makes it a crime punishable by a fine of not less than one hundred nor more than one thou-

[85] N.Y. GEN. BUS. LAW § 136 (McKinney 1968) (*formerly* PENAL LAW § 1425).

[86] CAL. MIL. & VET. CODE § 614 (West 1955).

[87] People v. Cowgill, 274 Cal. App. 2d 174, 78 Cal Rptr. 853 (Super. Ct. 1969).

[88] Cowgill v. California, 396 U.S. 371 (1970).

[89] *Id.* at 372 quoted at not 77, *supra.*

[90] The 1967 Amendment added the words "contemptuous," "burn," "destroy," "trample upon," and "otherwise" and increased the penalty from a maximum of $100 fine and/or imprisonment for 30 days. Legislative materials are extremely limited but it may be determined that the amendment was introduced to effect the changes in penalty and add the words "burn," "destroy," and "trample upon" with the other changes having been made by the respective committees. OHIO GENERAL ASSEMBLY BULL., 107th General Assembly, Regular Sess., 383 (1968); 132 OHIO S. JOUR., 107th General Assembly, Regular Sess., 785 (1967); 132 OHIO H.R. JOUR., 107th General Assembly, Regular Sess., 812, 912 (1967).

sand dollars and/or imprisonment for not less than thirty days nor more than one year, to

1. Contemptuously print, paint or place a word, figure, mark, picture, or design upon a flag, standard, color, or ensign of the United States, or of this state, or cause it to be done
2. Expose or cause to be exposed, such flag, standard, color, or ensign upon which is printed, painted, or placed, or to which is attached or appended a word, figure, mark, picture, or design
3. Manufacture or have in possession an article of merchandise upon which is placed or attached a contemptuous representation of such flag, standard, color or ensign
4. Publicly mutilate, burn, destroy, defile, deface, trample upon, or otherwise cast contempt upon such flag, standard, color, or ensign.

[The words "flag," "standard," "color," or "ensign" include] any flag, standard, color, or ensign or a picture or representation thereof, made of or represented on any substance, and purporting to be a flag, standard, color, or ensign of the United States, or this state or a picture or representation thereof, upon which is shown the colors, the stars, and the stripes in any number thereof, or which might appear to represent a flag, standard, color, or ensign of the United States or of this state.

In addition to these provisions several states employ the language "cast contempt by word or act" and exempt documents, stationery, ornaments, jewelry and the like.[91] While the issue is yet untried in the appellate courts, the Ohio statute, like its recent federal counterpart, by its language does not proscribe commercial uses of the flag or parts thereof, counter to the United States Flag Code and the earlier desecration statutes.

The power of the states to enact legislation protecting the national flag from desecration[92] has been recognized by both Congress[93] and the Court,[94] but without definition of either the interest protected by or the extent of that power. For example, if the flag is a symbol subject to protection as a symbol then the states' power might include the authority to punish one who lowers the flag during a protest march,[95] whereas if the state interest is limited to preserving the peace, then more violent activity would be required to complete an offense.[96] The determinative issue should center around the effect of the message conveyed under the particular circumstances, and not on the simple fact that flag desecration requires action. Under this view, the issue might be not that a flag was torn, but that it was

[91] *See, e.g.*, 11 DEL. CODE ANN. tits. 531-34 (1953) (*amended subsequently*, 1967) and N.Y. GEN. BUS. LAW § 136 (McKinney 1968) (*formerly* PENAL LAW § 1425).

[92] No appellate court cited has approached the problem of the power of a state to protect a state flag.

[93] 18 U.S.C.A. § 700(c) (Supp. 1970).

[94] Halter v. Nebraska, 205 U.S. 37 (1907); Street v. New York, 394 U.S. 576 (1969) (Warren, C.J., and Fortas, J., dissenting separately).

[95] Hinton v. State, 223 Ga. 174, 154 S.E.2d 246 (1967).

[96] *See e.g.*, People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846, *review granted*, 39 U.S.L.W. 3161 (U.S. Oct. 19, 1970) (no. 169) (dissenting opinion).

torn at an American Legion convention as opposed to a college classroom. The effect of the content of the symbolic speech presents the constitutional question, and that effect is determined by a political reaction to the speech and its form—not to the form alone.

While characterization of many of these statutes as unconstitutionally broad and/or vague may depend in part upon a definition of the governmental interest which they protect, it is clear that recent applications have not been uniform and that the statutes put prior restraints on political expression by placing vast discretionary power in the hands of law enforcement officers and the courts. If speech is protected by the first amendment and action, communicative or not, may be proscribed, then a clear manifestation of intent to desecrate the flag, such as publicly burning it, would constitute an offense[97] and painting an "Indianapolis 500" racing car with stars and stripes would not.[98] But if "contemptuous," "defile," and "cast contempt" are not defined and non-verbal communication, no matter what its content, is subject to only qualified protection, then one who flies the flag below and to the left of the United Nations flag as an expression of political dissent may violate the law.[99] Do long hair and a beard make contemptuous or defiling a miniture flag sewn to a protestor's shirt and their absence exempt the Zenith policeman who has another sewn to his uniform (in obvious disregard of the Flag Code)? If any contemptuous use of the colors, stars, and stripes on any substance in a manner which may appear to represent the flag is proscribed, then why may a stars and stripes "peace button" be suspect[100] when a watch face painted with a caricature of a politician apparently dressed in parts of the flag is not? The problems posed by these examples are not unanswerable and some statutes may be curable through narrowing interpretation, but the process is only begun.

B. *The State Statutes in the Courts*

A speech/conduct dichotomy appears in those recent cases upholding state flag desecration statutes. The Georgia courts affirmed a conviction for contemptuously abusing the state and national flags of those who lowered them at a county court house during a "freedom" march. Holding the act of lowering to have been sufficient under the circumstances to show contempt, the state's highest court refused to recognize a free speech issue on the basis that the statute prohibited conduct.[101] The California *Cowgill*

[97] *See, e.g.*, Street v. New York, 394 U.S. 576 (1969).

[98] Time, July 6, 1970, at 9.

[99] Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970).

[100] Long Island Vietnam Moratorium Comm. v. Cahn, 39 U.S.L.W. 2015 (E.D.N.Y. Jun. 22, 1970).

[101] Hinton v. State, 223 Ga. 174, 154 S.E.2d (1967) (this may be the only reported appellate case dealing with desecration of a state flag). It should be noted that in this case both flags were torn and waved in the faces of law enforcement officers after they were lowered. However, those who lowered the flags were apparently not the ones who tore them, and the court's opinion

court,[102] noting that the operative statute did not contain the words "cast contempt by word or act,"[103] and conceding that if it were violated by words alone it would be overly broad, held that the prohibitions applied to acts only, as distinguished from words. Citing *O'Brien*,[104] the court pointed out that there are limits to what may be called speech when the intent is to express an idea through conduct and stated that, even conceding the acts proscribed to have been symbolic speech, acts are afforded less first amendment protection than verbal communication. In this instance, the court held, the sufficiently strong legitimate governmental interest in controlling the non-speech element to maintain the public order justified incidental limitations on the defendant's qualified right to cause a flag to be made into a vest and to wear the vest publicly, even absent a showing that the peace had been breached.

New York courts also have distinguished between the protection afforded words and acts under the first amendment. One court rejected a free speech argument in disallowing a demurrer to an indictment for flag desecration of those responsible for a student publication's inclusion of photographs of a woman apparently clad only in boots and a flag in poses with a man dressed to represent a soldier.[105] Similarly, citing *Miller*,[106] another court noted that labeling an action as speech does not transform it and denied the first amendment argument of an art gallery manager who displayed "constructions" which protested the Vietnam war through use of the flag.[107] This court read the statute[108] as grounded in the state's police power and rejected a vagueness argument even though there had been no public disorder connected with display of the "art."

In their application of *O'Brien*[109] and *Miller*[110], these courts, it is suggested, have overlooked two important considerations vital even to the draft card cases themselves. First, the substantial governmental non-speech objective is undefined. A statute which prohibits desecration of *the* flag by word or act seeks to regulate expression; the objective is not examined because it is not recognized. Second, by labeling flag desecration as conduct

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does not directly connect the act of lowering with these subsequent acts. That is, the conviction sustained was for lowering the flags and not apparently as part of the act of tearing them.

102 People v. Cowgill, 274 Cal. App. 2d Supp. 923, 78 Cal. Rptr. 853 (Super. Ct. 1969); *see* discussion notes 86 to 89, *supra.*

103 CAL. MIL. & VET. CODE § 614 (West 1955).

104 United States v. O'Brien, 391 U.S. 367 (1968).

105 Civil Liberties, Sept., 1970, at 1, col. 1.

106 United States v. Miller, 367 F.2d 72 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967) (a draft card burning case).

107 People v. Radich, 53 Misc. 2d 717, 279 N.Y.S.2d 680 (N.Y. City Crim. Ct. 1967); for a more complete discussion of this case, *see* notes 170 and 183, *infra.*

108 N.Y. GEN. BUS. LAW § 136 (McKinney 1968) (*formerly* PENAL LAW § 1425).

109 United States v. O'Brien, 391 U.S. 367 (1968).

110 United States v. Miller, 367 F.2d 72 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967) (a draft card burning case).

as opposed to speech, the statutes are construed to have only an incidental effect on freedom of speech and the communicative content of the action is not weighed against the state's interest in prohibiting its dissemination. On the other hand, at least three courts have recognized the effect of the statutes on the content of flag oriented dissent and, while not weighing the state's interest in proscription, have applied standards of vagueness and broadness to the intent and circumstances of the desecrator's expression.

Observing that political campaign buttons often contain parts of the flag, a federal district court held that the New York statute was intended to protect the flag and did not extend beyond, although if read literally it would proscribe the use of a peace symbol superimposed on a circular decal containing stars in the upper left hand quadrant and stripes in the other three. The court stressed that its decision neither extended to the validity of the statute as a whole nor reached the first amendment issue.[111] Noting that political demonstrations were exempted by the Pennsylvania statute, a court of that state focused on the element of intent in dismissing charges against a draftee who reported for induction dressed in shorts with a flag draped around his shoulders. The court put considerable emphasis on the defendant's testimony that he did not intend to desecrate the flag, the newness, cleanliness and well cared for condition of the flag used, and the fact that no breach of the peace had resulted from the demonstration.[112]

A divided Ohio appellate court limited the words "otherwise cast contempt" in light of a subsequent legislative amendment,[113] legislative materials associated with the recent federal law,[114] and rules of construction of criminal statutes, holding that an indictment charging that the defendant "did unlawfully, publicly and contemptuously cast contempt upon a flag of the United States of America by publicly wearing same as a cape" did not state an offense.[115]

> The conclusion that the act of 'otherwise cast contempt' must be a definable one is required if we are to elude the 'vice of vagueness' . . . avoid contravening the First Amendment, and if we are to prevent the trier of a cause from creating his own standards in each case . . . .[116]

The court concluded that the phrase was restricted by the words which precede it, so that its meaning was encompassed by acts of physical destruction or abuse. Again, there was no breach of the peace involved in the case.

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111 Long Island Vietnam Moratorium Comm. v. Cahn, 39 U.S.L.W. 2015 (E.D.N.Y. Jun. 22, 1970).

112 Commonwealth v. Sgorbati, 38 U.S.L.W. 2617 (C.P. Philadelphia County, Pa. May 15, 1970).

113 OHIO REV. CODE ANN. § 2921.05 (Page Supp. 1969); *see* discussion accompanying notes 90 to 100, *supra.*

114 18 U.S.C.A. § 700 (Supp. 1970); *see* discussion notes 128 to 153, *infra.*

115 State v. Saionz, 23 Ohio App. 2d 79, 80, 52 Ohio Op. 2d 64, 65, *oral argument on appeal requested* (Ohio Dec. 22, 1969), (No. 69-809).

116 *Id.* at 83, 52 Ohio Op. 2d at 66.

One state flag desecration statute has been struck down by a federal court.[117] Initially, Delaware officials sought to enjoin a state resident named Hodsdon from flying the flag at half mast and to the left of his residence while flying the United Nations flag on the right, counter to the display rules contained in the United States Flag Code.[118] The court denied relief on jurisdictional grounds, noting that the Flag Code does not proscribe behavior and suggesting that a state forum was the proper one.[119] Subsequently, action was brought for violation of the state statute. Hodsdon's motions for dismissal and a writ of prohibition were denied[120] and he sought to have the Delaware law declared unconstitutionally vague by a federal court.[121] That court found the statute vague and overbroad on its face as "directed not to rules, if they exist, governing display of the flag, but to the attitude displayed by the person who flies it."[122] District Judge Wright's opinion noted that Hodsdon had been using the flag to express displeasure over American involvement in Vietnam and, citing *Stromberg*[123] and *Tinker*,[124] recognized this as symbolic expression protected by the first amendment, absent factors justifying its limitation. Distinguishing the governmental interest in *O'Brien*[125] and *Miller*,[126] Judge Wright concluded that the statute "encompasses acts which bear no relation to any interest within the legislative competence and which are intended and understood as symbolic speech."[127]

C. *The Federal Flag Desecration Statute*, 18 U.S.C.A. § 700

Excepting a law covering the District of Columbia, Congress enacted no flag desecration statute until 1968. That statute provides:

> Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both.
>
> The term 'flag of the United States' as used in this section, shall include any flag, standard, colors, ensign, or any picture or representation of

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117 11 DEL. CODE ANN. tits. 531-34 (1963) (amended subsequently, 1967) specifically tit. § 532 which provides in part:

> Whoever publicly mutilates, defaces, defiles, defies, tramples upon or casts contempt either by word or act, upon any such flag, standard, color or ensign—
> Shall be fined not more than $100 or imprisoned not more than 30 days, or both.

118 36 U.S.C. § 175(c) (1964).

119 State of Delaware *ex. rel.* Trader v. Hodsdon, 265 F. Supp. 308 (D. Del. 1967).

120 Hodsdon v. Superior Court, —— Del. ——, 239 A.2d 222 (1968).

121 Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970).

122 *Id.* at 534.

123 Stromberg v. California, 283 U.S. 359 (1931).

124 Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

125 United States v. O'Brien, 391 U.S. 367 (1968).

126 United States v. Miller, 367 F.2d 72 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967).

127 Hodsdon v. Buckson, 310 F. Supp. 528, 534 (D. Del. 1970).

> either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.
>
> Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.[128]

This legislation was clearly in response to the incidents of flag burnings and other acts of desecration in protest to American involvement in Vietnam. A multitude of bills were introduced in the 90th Congress and debate was lengthy.[129] One subcommittee alone heard testimony for five days.[130] Statements were often heated[131] and a conclusion of congressional intent more specific than that both houses intended to proscribe acts of desecration might be subject to serious qualification if based on analysis of the floor debates. The more reliable committee reports, moreover, are not conclusive on the critical issues.

In general, the power of the federal government to enact and enforce legislation protecting the flag has been assumed without argument.[132] One federal district court considered the problem but, citing *United States v. Curtis-Wright Export Corp.*[133] and the necessary and proper clause, considered it in no depth.[134] Analogous to the situation discussed above with respect to the states, it is somewhat difficult to justify incidental restrictions on qualified first amendment rights in the furtherance of an important or substantial governmental interest, in the manner of *O'Brien*[135] if the grounding and scope of that interest have not been defined. There is at least a rational connection between the functions of the federal government and protection of draft classification certificates and military uniforms.

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128 18 U.S.C.A. § 700 (Supp. 1970).

129 113 CONG. REC. 16441-16498 (1967) (house floor debates on H.R. 10480); 114 CONG. REC. 18358, 18558, 18980 (1968).

130 *Hearings on H.R. 271 and Similar Proposals to Prohibit Desecration of the Flag Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess., ser. 4 (1967) [hereinafter cited as 1967 *Hearings*].

131 *See, e.g.*, 113 CONG. REC. 16446 (1967) (remarks of Mr. Haley).

132 Halter v. Nebraska, 205 U.S. 34 (1907); Hoffman v. United States, 256 A.2d 567 (D.C. Cir. 1969); Letter from Ramsey Clark, Attorney General, to Emanual Celler, Chairman, House Judiciary Committee, May 8, 1967; Letter from Ramsey Clark, Attorney General, to James O. Eastland, Chairman Senate Judiciary Committee, May 15, 1967; 1967 Hearings, supra note 133, at 279 (testimony of Professor Herbert Reid).

133 299 U.S. 304 (1963).

134 United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969), discussed more fully notes 154 to 158, *infra*.

135 United States v. O'Brien, 391 U.S. 367 (1968).

Not immediately obvious is such a functional connection regarding the necessity to protect the national symbol. If the authority were grounded in a kind of federal "police power," the limits of that power as against first amendment freedoms might be different from those restricting use of power inherent in the concept of sovereignty.

A more immediate and narrow problem, however, concerns the extent of congressional intent. Given the power to protect the flag, just what acts did Congress intend to proscribe? It is clear that the judiciary committees of both houses were presented with opinions on, and considered carefully, the proposed legislation in light of first amendment freedoms.[136] In letters to the chairmen of both these committees, then Attorney General Ramsey Clark, citing *Barnette*,[137] *Stromberg*[138] and *Baggett*,[139] warned of possible infringement on free speech:

> Particular care should be exercised to avoid infringement of free speech. To make it a crime if one 'defies' or 'casts contempt . . . either by word or act' upon the national flag is to risk invalidation. Such language reaches toward conduct which may be protected by first amendment guarantees. The courts have been insistent on guarding against sanctions which reach the protected expression of ideas and also have struck down on grounds of vagueness provisions which are so broad that they may include protected speech along with conduct that could constitutionally be penalized.
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> . . . .
>
> . . . in order to reduce the risk of challenge on vagueness and first amendment grounds, it is recommended that the word 'defies' and the phrase 'or casts contempt, either by word or act,' be avoided as separate acts constituting offenses.[140]

While not totally consistent with all utterances from the floors of both houses,[141] the action and report of the Senate Judiciary Committee reflects a definite intent to specifically limit the language of the enactment to avoid infringement on first amendment guarantees. For example, the word "knowingly" was added to "make it clear that knowledge and intent must be present to constitute a criminal act."[142] That committee reported in part:

> The purpose of the proposed legislation, as amended, is to prohibit and punish by Federal law certain public acts of desecration of the flag.
>
> . . . .
>
> The bill [H.R. 10480] does not prohibit speech, the communication of

136 *See, e.g.*, Letter from Professor Arthur Sutherland to Emanual Celler, Chairman, House Judiciary Committee, May 31, 1967.

137 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

138 Stromberg v. California, 283 U.S. 359 (1931).

139 Baggett v. Bullitt, 377 U.S. 360 (1964).

140 Letter from Ramsey Clark, Attorney General, to James O. Eastland, Chairman, Senate Judiciary Committee, May 15, 1967; Letter from Ramsey Clark, Attorney General, to Emanual Celler, Chairman, House Judiciary Committee, May 8, 1967.

141 *Compare* 113 CONG. REC. 8497, 16446, 16452 *with* 16464-69 (1967).

142 2 U.S. Code Cong. & Ad. News 2511 (1968).

> ideas, or political dissent or protest. . . . The bill does prohibit public acts of physical dishonor or destruction of the flag of the United States. The language of the bill prohibits intentional, willful, not accidental or inadvertent public physical acts of desecration of the flag. Utterances are not proscribed.[143]

Moreover, a speech/conduct dichotomy is apparent in this language and is reflected in the citing of *Miller*[144] and *O'Brien*[145] in further discussion of the proposed legislation's constitutionality.[146]

The question can narrow, then, to one of whether Congress intended the word "defiling" ("defy" was not included) to be read in conjunction with "cast contempt by publicly mutilating, defacing, burning, or trampling," or whether "defiling" was intended to stand alone to encompass other flag oriented acts of non-verbal communication. The conclusion clearly, if not unquestionably, should be the former, as the Ohio *Saionz* court[147] reasoned. Under this reading, publicly spitting on the flag would complete an offense while publicly cursing it would not.[148] As the state cases have demonstrated in interpreting phrases such as "otherwise cast contempt," the alternative conclusion would manifest both vagueness and broadness. While in either case tearing[149] or burning[150] the flag would violate the statute, the alternative conclusion would permit a political activist to be punished for wearing a shirt which resembles the flag[151] while the professional entertainer who wears one and the publisher who prints his photograph do so with apparent immunity.[152] This certainly is not rational legislative selection but rather broad interpretive power at the enforcement level. Moreover, if wearing the shirt is recognized as political expression protected in some degree by the first amendment, then it is strongly arguable that Congress did not intend to enact legislation restricting the guarantees of that amendment.

Finally, although Congress specifically did not pre-empt the jurisdiction of the states, it may seriously be questioned whether a state in protecting the flag can enforce legislation more broadly restrictive on first amendment freedoms than similar federal law. Again, the answer to this question may

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143 *Id.*

144 United States v. Miller, 367 F.2d 72 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967).

145 United States v. O'Brien, 391 U.S. 367 (1968).

146 2 U.S. Code Cong. & Ad. News 2508 (1968).

147 State v. Saionz, 23 Ohio App. 2d 79, 52 Ohio Op. 2d 64, *oral argument on appeal requested* (Ohio Dec. 22, 1969) (No. 69-809). *But see* Hoffman v. United States, 256 A.2d 567 (D.C. Cir. 1969).

148 *See, e.g.*, 1967 *Hearings*, *supra* note 130, at 205.

149 Joyce v. United States, 259 A.2d 363 (D.C. Cir. 1969).

150 United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969).

151 Hoffman v. United States, 256 A.2d 567 (D.C. Cir. 1969).

152 Time, July 6, 1970, at 10.

depend upon the definition of the respective governmental interests being furthered, as some courts have inferred.[153]

D. *The Federal Statute in the Courts*

Three 1969 decisions affirmed convictions under the federal statute. In *United States v. Ferguson*,[154] the defendant pleaded guilty and was convicted under 18 U.S.C.A. § 700 of burning a flag on the steps of a United States courthouse, attacking the constitutionality of the statute and asserting that the act was one of political protest and thus privileged under the first amendment. In denying the motion to dismiss, the court relied heavily on the four *O'Brien*[155] factors. After disposing of the question of governmental power to enact such legislation,[156] the court reasoned that the important or substantial government interest protected is preserving the loyalty and patriotism represented by the flag, citing *Halter*,[157] that the government interest is unrelated to the suppression of free speech (presumably so long as "free" speech is loyal and patriotic), and that the incidental restriction on first amendment rights was minimal, because the statute does not deprive the actor of an audience or another means of reaching it.[158]

In *Joyce v. United States*,[159] a spectator to an inauguration parade took a four by six inch flag from its seven inch post, "tore it, then folded it lengthwise . . . tied it to his right index finger and raised his hand with the index and middle finger in a V position and waved it back and forth above his head. . . ."[160] The court of appeals rejected his free speech argument on appeal, citing its earlier opinion in *Hoffman v. United States*.[161] In that case the court affirmed a conviction of the political activist Abbie Hoffman, who had been arrested on his way to testify before the House of Representatives Committee on Un-American Activities wearing a shirt "that resembled the American flag,"[162] to which were affixed two buttons reading "Vote Pig Yippie in Sixty-Eight," and "Wallace for President, Stand Up for America." Disposing of Hoffman's appeal arguments, the court stated that the statute is reasonably certain and not vague, that the first amendment

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153 *See, e.g.*, Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970); People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846, *review granted*, 39 U.S.L.W. 3161 (U.S. Oct. 19, 1970) (No. 169) (dissenting opinion).

154 302 F. Supp. 1111 (N.D. Cal. 1969).

155 United States v. O'Brien, 391 U.S. 367 (1968).

156 302 F. Supp. 1111 (N.D. Cal. 1969).

157 Halter v. Nebraska, 205 U.S. 34 (1907).

158 A view perhaps more suggestive of Justice Harlan's concurring opinion in *O'Brien* than of the majority opinion delivered by Chief Justice Warren.

159 259 A.2d 363 (D.C. Cir. 1969).

160 *Id.*

161 256 A.2d 567 (D.C. Cir. 1969).

162 *Id.* at 568.

"protects freedom of speech and not freedom of conduct,"[163] and, citing *O'Brien*[164] that "[s]urely the Government has a substantial, genuine and important interest in protecting the flag from public desecration by contemptuous conduct."[165] In response to the argument that the particular conduct did not fall within the statutory proscription,[166] reading the legislative history of the enactment, the court concluded that "defile" was "intended to include public conduct which brings shame or disgrace upon the flag by its use for an unpatriotic or profane purpose,"[167] and that it would "not construe the Statute as narrowly as appellant urges."[168] Parenthetically, public disorder was not a stated factor in any of these three federal opinions.

As with the decisions upholding the state statutes, these federal courts have taken it almost as given that there is a substantial governmental interest in protecting the flag from unorthodox expressive use, in contrast to Chief Justice Warren's lengthy effort to connect the non-speech objective to a rational governmental purpose in *O'Brien*.[169] That such an interest is constitutionally justified is not nearly so important as a determination of the extent to which it justifies suppression of freedom of expression. Moreover, the content of, for example, the message conveyed by Hoffman's shirt is yet to be given recognition or even examined as to Hoffman's intent.

E. *The Illustrative Case, People v. Radich*

The problem of the states' power to regulate non-verbal expression and the extent to which such expression in form or content is protected by the first amendment are illustrated in a case which has developed concurrently with the recent federal legislation and continuing expansion of the amendment by the Court. For example, the case was at least before the 90th Congress during its consideration of the flag desecration bills.[170] Radich, the operator of an art gallery on Madison Avenue in New York City, displayed thirteen three-dimensional objects, called "constructions," made partly of United States flags or portions thereof and partly of other objects including a Viet Cong flag, a Russian flag, a Nazi swastika and a gas mask. Three of the constructions singled out for particular attention were an object resembling a gun caisson wrapped in a flag, a flag stuffed to a six foot human form being hanged by the neck, and a seven foot cross with a bishop's mitre on top and the horizontal piece wrapped in church flags and

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163 *Id.* at 569.

164 United States v. O'Brien, 391 U.S. 367 (1968).

165 Hoffman v. United States, 256 A.2d 567, 569 (D.C. Cir. 1969).

166 *Contra see* discussion notes 136 to 152, *supra.*

167 Hoffman v. United States, 256 A.2d 567, 570 (D.C. Cir. 1969).

168 *Id.* at 570.

169 United States v. O'Brien, 391 U.S. 367 (1968).

170 *See, e.g.*, 1967 *Hearings*, *supra* note 130, at 48-51, 104, 139, 224, 313; 113 CONG. REC. 16456 (1967).

protruding from it a flag rolled and used to depict an erect phallus. This "art" was displayed to a background of recorded war protest songs in the second floor gallery, which was open to the public and had a street display window. Radich was subsequently to testify that neither he nor the artist intended disrespect for the flag; the intent of the constructions was to express protest toward American involvement in Vietnam. It has not been contested by the state that the display was non-verbal political expression. The exhibition was reviewed by no less an institution than the New York Times. Radich was not charged with mutilating the flag; no "pure speech" was material to the case; and no immediately proximate or actual breach of the peace was involved at any time during the display.[171]

Initially the United States Flag Foundation brought an action against Radich;[172] he was subsequently convicted of casting contempt on the flag by displaying the constructions in violation of the New York flag desecration statute.[173] The city criminal court opinion held that the constructions, as sculptures, were not exempted by the statute as "pictures" and were contemptuous. This court understood the statute to be grounded in the state's power to protect the public safety, peace and order, holding that it was not vague under the due process clause of the fourteenth amendment and, citing *Miller*,[174] rejecting Radich's free speech argument with the reasoning that labeling something as speech does not transform it from conduct.[175] A dissenting opinion, acknowledging the constructions to be loathsome art and citing *Barnette*,[176] would have held the statute overly vague as containing no ascertainable standard of guilt, asserting that Radich was being convicted for the content and not the form of the exhibition, and noting that if he had been able to transform that content into words he would not have been punished for them.[177]

In affirming Radich's conviction the state's highest court in a divided opinion held that the constructions clearly dishonored the flag in violation of the statute.[178] Citing *O'Brien*[179] and *Hoffman*[180] and relying heavily on Chief Judge Fuld's opinion in *Street*,[181] the court reasoned that the statute was a legitimate exercise of the state's power to prevent breaches of the

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171 *See* discussion notes 106 to 108, *supra.*

172 United States Flag Foundation, Inc. v. Radich, 53 Misc. 2d 597, 279 N.Y.S.2d 233 (Sup. Ct. 1967).

173 N.Y. GEN. BUS. LAW § 136 (McKinney 1968) (*formerly* PENAL LAW § 1425).

174 United States v. Miller, 367 F.2d 72 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967).

175 People v. Radich, 53 Misc. 2d 717, 279 N.Y.S.2d 680 (N.Y. City Crim. Ct. 1967).

176 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

177 People v. Radich, 53 Misc. 2d 717, 279 N.Y.S.2d 680 (N.Y. City Crim. Ct. 1967) (Basel, J., dissenting).

178 People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846. *Radich* was argued before the United States Supreme Court on February 22, 1971.

179 United States v. O'Brien, 391 U.S. 367 (1968).

180 Hoffman v. United States, 256 A.2d 567 (D.C. Cir. 1969).

181 People v. Street, 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967).

peace, was unrelated to the suppression of free speech and did not require an element of intent to convict. Chief Judge Fuld dissented. Like the majority he read the statute to be grounded in the state's police power but distinguished *Street*[182] on its facts and stated that nothing in his earlier opinion held that symbolic speech was entirely removed from the protection of the first amendment. That amendment, he asserted, protects the substance of speech, not its form, and, "in the absence of a showing that the public health, safety or the well being of the community is threatened, the State may not act to suppress symbolic speech or conduct having a clearly communicative aspect."[183]

IV. CONCLUSION

In a decade which has brought expanded application of first amendment guarantees to many types of activities, flag oriented communication remains largely unrecognized by the courts. Thus, while a civil rights marcher, an armband wearer and an actor in a protest skit communicate within the protection of the amendment, the status of one who employs the flag or part of it to express a political idea in dissent is in general undefined. Coupled with increased uses of the flag to express support for current government policies and the varied intensity of emotions surrounding the national symbol, this undefined status has led to a wide diversity of applications within and among often conflicting statutes. At present, the dissenter who employs the flag can be punished for his communication while, absent a substantial governmental interest including an immediate breach of the public order, the protest marcher is protected. The dissenter who wears the colors of *the* flag in a shirt may be sanctioned while the dissenter who chooses *a* flag or an armband is entitled to state protection for his activity. The artist who uses the flag in dissent does so at his peril, while the publisher who prints a photograph of the art and the writer who describes it do so under the protection of the first amendment.

It is possible to superficially resolve some of the issues involved in flag oriented expression, on a case-by-case basis, without reaching the constitutional cruxes of the nature of that expression and the governmental interest in its suppression. For example, the Ohio statute examined and the federal statute as construed by at least one court[184] are unconstitutionally vague because they expose a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct.[185] Thus convictions under the statutes have been reversed and the statutes

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[182] *Id.*

[183] People v. Radich, 26 N.Y.2d 114, 127, 257 N.E.2d 30, 37 308 N.Y.S.2d 846, 856 (1970).

[184] Hoffman v. United States, 256 A.2d 567 (D.C. Cir. 1969).

[185] Rowan v. United States Post Office Dep't, 397 U.S. 728, 740 (1970); United States v. Cardiff, 344 U.S. 174, 176 (1952).

judicially narrowed on the basis that criminal intent to desecrate is required[186] or that the enacting legislatures sought to protect the flag and not any use of its colors and patterns.[187] Other superficial but rational solutions are possible and perhaps probable.[188] It can be contended that proscribing the artist's communication while exempting the printer's violates equal protection. Moreover, many of the state desecration statutes may define the flag more broadly than the federal one and do not, as it does, require proof of intent to complete the offense.[189] It can be argued that because the national legislature defines the flag and has now defined the measure of its protection from desecration, the states cannot impose more sweeping sanctions.[190]

However, when a court strikes down a state statute as so broad as to encompass acts which bear no relation to any interest within the legislative competence,[191] or affirms a conviction recognizing the statute as grounded in the state's police power,[192] the extent and nature of the governmental interest in suppressing a type of speech is called into question. And when dissenting opinions recognize a conviction as applying to the content and not the form of the desecrator's message,[193] then the substance of that message is at issue.

It can be argued that flag burning, as draft classification certificate burning, is unlawful destruction of property to express a political viewpoint.[194] It is submitted that such an analysis misses the point. There is little question that the flag desecrator does express one or more political viewpoints, but it is the nature of the flag and the government's protection of it which are unique. The flag as property is nothing more than a possession; the flag as defined by Congress, displayed and desecrated is itself symbolic expression. It is precisely because of the flag's symbolism that the act of desecrating it is inseparable from the communication intended. The notion

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[186] Commonwealth v. Sgorbati, 38 U.S.L.W. 2617 (C.P. Philadelphia County, Pa. May 15, 1970); State v. Saionz, 23 Ohio App. 2d 79, 52 Ohio Op. 2d 64, *oral argument on appeal requested* (Ohio Dec. 22, 1969) (No. 69-809). *But see* Hoffman v. United States, 256 A.2d 567 (D.C. Cir. 1969).

[187] Long Island Vietnam Moratorium Comm. v. Cahn, 39 U.S.L.W. 2015 (E.D.N.Y. Jun. 22, 1970).

[188] And even more probable now that at the time *Street* was decided because of the recent federal statute. *See* note 38, *supra.*

[189] It can be effectively argued that, for example, Radich committed no offense under the federal statute.

[190] This is not, strictly speaking, a pre-emption argument, by the very language of the federal statute. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), does not apply in any direct sense.

[191] Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970).

[192] People v. Radich, 53 Misc. 2d 717, 279 N.Y.S.2d 680 (N.Y. City Crim. Ct. 1967).

[193] People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846, *review granted*, 39 U.S.L.W. 3161 (U.S. Oct. 19, 1970) (No. 169) (Fuld, J., dissenting); People v. Radich, 53 Misc. 2d 717, 279 N.Y.S.2d 680 (N.Y. City Crim. Ct. 1967) (Basel, J., dissenting).

[194] Note, *Flag Burning, Flag Waving and the Law*, 4 VALPARAISO L. REV. 345, 347 (1970).

that "action is action, and subject to regulation, and speech is speech, and is not limitable, period" is tenuous enough when applied to any non-verbal expression; it is simply not realistic when applied to flag oriented dissent. Displaying art, no matter how repulsive, is nothing if it is not communication. The artist who uses the flag does so precisely because of what its symbolism will call up in the minds of those who study his work.[195] To suggest that he may disseminate his images only in writing or "pure speech" suppresses nothing but expression. The draftee who reports for induction draped in a flag does so because he wants to remind those who observe him that his remains may be sent home covered by one.[196] These ideas may be repulsive, but they are primarily ideas, not conduct. When the government seeks to control the dissemination of these ideas, it seeks to control the message, not a separable form of its communication. If this were not so, if *the* flag were not unique, then the courts would long since have recognized the content of the desecrator's expression and would have afforded it the same protection under the first amendment extended to a red flag,[197] an armband,[198] or a protest march.[199] A *flag* desecration statute is not required to prosecute one who burns "property" in the street.

Clearly, the *O'Brien*[200] test is not applicable to flag desecration, because the governmental objective is not the control of action with incidental infringement on freedom of expression. The objective is precisely the opposite. The flag desecration statutes proscribe expression not only in form, but primarily in content. It is this content which presents a threat to interests which the legislatures are empowered to protect.[201] Moreover, the content proscribed is seen as political in nature, as the more recent statutes' exemption of commercial speech, emphasis on intent, legislative histories and applications by law enforcement agencies suggest. This analysis does not conclude that legislatures are constitutionally powerless to proscribe all flag oriented dissent, but rather that the first amendment limitations on that power are those relating to the content of expression and not to its form. Under this analysis, the desecrator's message may be "fighting words,"[202] and the flag burner may present an immediate threat to the public order,[203] but it is the content of that message in the particular circumstances which

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[195] People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846, *review granted*, 39 U.S.L.W. 3161 (U.S. Oct. 19, 1970) (No. 169).

[196] Commonwealth v. Sgorbati, 38 U.S.L.W. 2617 (C.P. Philadelphia County, Pa. May 15, 1970).

[197] Stromberg v. California, 283 U.S. 359 (1931).

[198] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[199] Cox v. Louisiana, 379 U.S. 536, 555 (1965); Shuttlesworth c. Birmingham 394 U.S. 147 (1969).

[200] United States v. O'Brien, 391 U.S. 367 (1968).

[201] People v. Street, 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967).

[202] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[203] Brandenburg v. Ohio, 395 U.S. 444 (1969); Feiner v. New York, 340 U.S. 315 (1951).

must subject it to regulation and not the fact that it is communicated non-verbally.[204] Similarly, the effect of that content must be balanced, not against the interest of government in regulating conduct, but against the constitutional commitment to wide open, robust debate on public issues,[205] including wars.[206]

On the other side of the coin is the nature of the interest in suppressing the desecrator's message. That the legislatures have constitutional responsibility and primacy in determining the need for statutes to protect the flag's symbolism is one thing; it is another to interpret the interest protected by those statutes against the guarantees of the first amendment. The extent to which expression is subject to regulation must depend upon the interest protected by the applicable statute.[207] It is not nearly so important to justify a source of legislative power to proscribe certain flag oriented expressions as to define the nature of the interest to which that power is applied. If power to protect the flag is inherent in the concept of sovereignty or necessary and proper to the conduct of war, then the extent to which expression can be suppressed is not the same as it might be if the legislative power were being applied to protect the public order.[208] This interest is simply not in a class with draft classification certificates and has not yet been otherwise defined. Even under the *O'Brien*[209] test, it is difficult to connect a non-speech objective to a rational governmental purpose if that objective is undefined. In consequence, the dissenter may be reasonably certain of the results of flying a Russian flag in his yard but may not be able to determine if he is free to fly the United Nations flag above his American one.[210]

This uncertainty, and its attendant broad suppression of dissent, has resulted from lower court application of the Supreme Court's judicial separation of conduct and its content. By labeling flag desecration as conduct these courts in general have neither recognized the content of the expression nor applied first amendment content tests as against a defined governmental non-speech objective. This treatment is perhaps unique to the symbolism of the United States flag. Seventeen years ago the Court held that a state

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[204] Not cited appellate court during the past decade justified the suppression of flag oriented dissent by characterizing its content as commercial, or obscene.

[205] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[206] Schacht v. United States, 398 U.S. 58 (1970).

[207] *Compare* Mr. Justice Black's dissent in *Cox v. Louisiana*, 379 U.S. 559 (1965) *with* his opinion in *Adderley v. Florida*, 385 U.S. 39 (1966), for example. While the actors in both cases could be said to have been engaged in symbolic expression, the state's non-discriminatory objective in *Adderley* justified the regulation.

[208] Consider in this regard Mr. Chief Justice Burger's lengthy discussion of the governmental interest in regulating the exercise of first amendment freedoms as grounded in the individuals right of privacy in his home. *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970). The interest protected by the statute in question was clearly and vitally material to the issue.

[209] United States v. O'Brien, 391 U.S. 367 (1968).

[210] Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970).

could not require an affirmative act of loyalty toward the flag. The extent to which a state may prohibit what are seen as negative acts against that flag depends upon recognition of the communicative political nature of those acts and definition of the interests against which they can be limited. The foregoing analysis has attempted to demonstrate the need for a step toward that recognition and definition.

L. M. McCorkle